

DEPARTURES



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DEPARTURES

I. Statutory Directives

18 U.S.C. § 3553

Although the Sentencing Reform Act of 1984 requires that a district court impose a sentence within the applicable guideline range in an ordinary case, 18 U.S.C. § 3553(a), it does not eliminate all of the district court's traditional sentencing discretion. Rather, it allows a departure from the guideline range if the court finds "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines that should result in a sentence different from that described," 18 U.S.C. § 3553(b), or when the guidelines otherwise specifically provide for a departure.

18 U.S.C. § 3742

Before the guidelines system was instituted, a federal criminal sentence within the statutory limits was not reviewable on appeal.¹ The Sentencing Reform Act of 1984 altered this scheme in favor of limited appellate jurisdiction to review federal sentences. Among other things, it allows a defendant to appeal an upward departure, and any sentence imposed "in violation of the law" or "as a result of an incorrect application of the sentencing guidelines." Similarly, the Government may appeal an otherwise final sentence.

II. *Koon v. United States*

In *Koon v. United States*,² the Supreme Court examined the issue of the standard of review to be applied by appellate courts in assessing district court departure decisions. The Court unanimously joined in Justice Kennedy's opinion that an appellate court should not review a district court's departure decision *de novo*, but instead should ask whether the sentencing court had abused its discretion in granting the departure.

In reaching its decision, the Court emphasized the role the Sentencing Commission has in monitoring district court decisions and refining the guidelines to specify precisely when departures are permitted. The Court noted that before a departure is authorized, certain aspects of the case must be found unusual enough for it to fall outside the heartland of cases in the sentencing guidelines. The Court further noted that sentencing courts are provided "considerable guidance" in this area by the Guidelines Manual as to which factors are likely or not likely to make a case atypical.

¹*Dorszynski v. United States*, 418 U.S. 424 (1974) (reiterating the general proposition that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end).

²116 S. Ct. 2035 (1996).

A number of factors are regarded by the sentencing guidelines as “discouraged” such that the factor should be used only in exceptional cases. These factors are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range. Examples include the defendant’s family ties and responsibilities, education or vocational skills, and military service. In addition, a number of factors such as race, sex, national origin and religion have been categorized as “forbidden” considerations in the departure decision process. The Commission has also recognized some factors which are “encouraged” and which the Commission has not been able to take into account fully in the guidelines such as victim provocation and disruption of a governmental function. Finally, if a factor is unmentioned in the guidelines, the court must, after considering the “structure and theory of both relevant guidelines, and the guidelines taken as a whole,”³ decide whether it is sufficient to remove it from the heartland cases. The court must bear in mind the Commission’s expectation that departures based on grounds not mentioned in the Guidelines Manual will be “highly infrequent.”⁴

Ultimately, a divided Court held that the district court in *Koon* had not abused its discretion in making a downward departure based on (1) the victim’s misconduct in provoking the defendant’s offenses, (2) susceptibility to abuse in prison, and (3) successive prosecutions. The Court found that the district court had abused its discretion, however, in making downward departures based on (1) the defendant’s low likelihood of recidivism and (2) the defendant’s collateral employment consequences because those factors had been adequately considered by the Commission.

III. Post-*Koon* Appellate Court Departure Decisions

United States Supreme Court

Prior to the *Koon* decision, the Seventh Circuit reversed a downward departure based on co-defendant disparity applying a *de novo* standard of review. The Supreme Court granted certiorari and summarily vacated the judgment and remanded the case back to the circuit court for further consideration in light of *Koon* and the abuse of discretion standard.⁵

United States Circuit Courts of Appeal

In the departure cases discussed below, appellate courts, applying the standard articulated in *Koon*, have reversed or affirmed departure sentences based on numerous factors.

Appellate courts **reversed downward departures** in the following cases:

³116 S. Ct. 2035 at 2045 (quoting *United States v. Rivera*, 994 F.2d 942 (1st Cir. 1992)).

⁴*Id.*

⁵*Meza v. United States*, 117 S. Ct. 478 (1996).

- A downward departure based on the defendant's alcohol problem, 20 years of military service, offense conduct not deemed a "serious fraud," susceptibility to abuse in prison because the defendant was a law enforcement officer, and problems associated with the defendant's status as a convicted felon. According to the appellate court, "none of the six factors underlying the district's decision justified a departure from the applicable guideline range."⁶
- A downward departure based on the defendant's "extraordinary" restitution. According to the appellate court, restitution was a discouraged factor and the amount of restitution in the instant case was not "extraordinary."⁷
- A downward departure based on the defendant's exposure to civil forfeiture. According to the appellate court, the mandate of §5E1.4 (Forfeiture) means "that the Commission viewed monetary forfeiture as entirely distinct from the issue of imprisonment." Therefore, exposure to civil forfeiture was not a valid reason for departure under §5K2.0.⁸
- A downward departure based on the defendant's "single act of aberrant behavior". According to the appellate court, the departure was unwarranted because the sentencing court failed to consider the structure and theory of the relevant guidelines and did not adequately analyze how and why specific conduct by the defendant was allegedly aberrant.⁹
- A downward departure based on a finding that defendant's conduct, possession of child pornography, was analogous to a situation qualifying for a mitigating role reduction. According to the appellate court, because the defendant pleaded guilty to possession of child pornography, an offense not requiring concerted activity, the mitigating role adjustment is not available by analogy or otherwise.¹⁰
- A case where the defendant's conduct was not a "single act of aberrant behavior," and the district court did not make a "refined assessment" of the difficulty of reservation life, steady employment, and stable family ties.¹¹

⁶*United States v. Rybicki*, 96 F.3d 754 (4th Cir. 1996).

⁷*United States v. Hairston*, 96 F.3d 102 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 956 (1997).

⁸*United States v. Weinberger*, 91 F.3d 642 (4th Cir. 1996).

⁹*United States v. Kalb*, 105 F.3d 426 (8th Cir. 1997).

¹⁰*United States v. Romualdi*, 101 F.3d 971 (3d Cir. 1996).

¹¹*United States v. Weise*, 89 F.3d 502 (8th Cir. 1996).

- A downward departure based on the comparatively lenient treatment given the defendant's similarly situated white co-defendants, and the decreased sentence more accurately reflected the defendant's culpability in the conspiracy. According to the appellate court, the disparity cited by the district court resulted from a proper exercise of prosecutorial discretion in selecting the charges to bring against each co-defendant.¹²
- A downward departure based on a finding that the defendant was not a threat to public safety. According to the appellate court, the district court abused its discretion in concluding that the defendant was not a threat to public safety because the defendant had not actually injured law enforcement officers despite numerous opportunities. The appellate court found that the defendant had a pattern of violent resistance of arrest, hostage-taking, and armed threats against law enforcement.¹³
- A downward departure based on family ties was denied. The appellate court concluded that the defendant's recognition of family ties, manifested by his decision to keep the baby he fathered out of wedlock, was not "sufficiently extraordinary" to support a downward departure.¹⁴

Appellate courts **remanded downward departures** in the following cases:

- A downward departure for diminished mental capacity based on the defendant's lack of education and inability to speak English. According to the appellate court, these factors did not constitute diminished mental capacity as a matter of law, and were otherwise invalid or discouraged. The other ground for the departure, "lesser harms," based on the defendant's belief that his girlfriend was in danger, was not found to be plainly erroneous. On remand, the district court was directed to explain the magnitude of the departure.¹⁵
- A case where the defendant voluntarily disclosed the offense prior to its discovery, but the district court did not make particularized findings that discovery was unlikely absent disclosure.¹⁶
- A case where the departure was based on the increased severity of the defendant's sentence resulting from her status as a deportable alien. According to the appellate court, because this

¹²*United States v. Perkins*, 108 F.3d 512 (4th Cir. 1997).

¹³*United States v. Atkins*, 116 F.3d 1566 (D.C. Cir. 1997).

¹⁴*United States v. Wilson*, 114 F.3d 429 (4th Cir. 1997).

¹⁵*United States v. Barajas-Nunez*, 91 F.3d 826 (6th Cir. 1996).

¹⁶*United States v. Besler*, 86 F.3d 745 (7th Cir. 1996).

was not a factor mentioned in the guidelines, the district court must make a “refined assessment” of the facts.¹⁷

- A case where the departure was based on diminished mental capacity. According to the appellate court, because there was no demonstration that the defendant’s significantly reduced mental capacity bore a causal relationship to the crime or that the defendant had an inability to process information, there was no support for such a significant departure.¹⁸
- A case where the departure was based on time served for the defendant’s expired sentence. According to the appellate court, a sentencing court cannot depart downward and reduce a defendant’s sentence for drug conspiracy based on the time served for a prior drug conspiracy conviction despite the fact that prior conviction served as predicate conduct for the subsequent conviction.¹⁹
- A downward departure based on the finding that the defendant’s aggravated felony conviction was not serious enough to warrant a sixteen-level increase. According to the appellate court, a sentencing court does have the legal authority to consider the underlying facts of the defendant’s aggravated felony conviction as a basis for departure. The appellate court concluded that the Sentencing Commission adequately considered the nature of the underlying convictions when it formulated USSG §2L1.2 and determined which type of prior offenses warranted a 16-level adjustment.²⁰
- A downward departure based on the lack of significant physical or psychological harm to the victim. According to the appellate court, the sentencing court erred in finding no harm to the victim. The child in this case required numerous therapy sessions and the harm suffered appeared to be typical of offenses involving molestation of children under the age of twelve. Further, lack of physical harm is clearly within the heartland of the offense. The court concluded that penetration by any means would have been a sexual act that would constitute criminal sexual abuse and would be covered by USSG §2A3.1.²¹

Appellate courts **reversed in part upward departures and remanded** to the district court in the following cases:

¹⁷*United States v. Charry Cubillos*, 91 F.3d 1342 (9th Cir. 1996).

¹⁸*United States v. Withers*, 100 F.3d 1142 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1282 (1997).

¹⁹*United States v. McHan*, 101 F.3d 1027 (4th Cir. 1996), *cert. denied*, 1997 WL 275967 (U.S. Jun. 16, 1997) (No. 96-8994).

²⁰*United States v. Rios-Favela*, 1997 WL 345959 (9th Cir. Jun. 25, 1997) (No. 96-50128).

²¹*United States v. Meacham*, 115 F.3d 1488 (10th Cir. 1997).

- A determination of the extent of the departure “in view of scant grounds” articulated. The basis for the upward departure, that the defendant’s conduct resulted in a significant disruption of a governmental function, was affirmed.²²
- An upward departure based on the defendant’s conduct toward the kidnapping victim. According to the appellate court, the abuse was so unusual and degrading that it warranted a departure for extreme conduct.²³

Appellate courts **affirmed downward departures** made in the following cases:

- A downward departure where defendant received no personal benefit from money laundering. According to the appellate court, because the money laundering guideline makes no mention of failure to receive personal benefit as a mitigating factor, the district court did not abuse its discretion in making the departure.²⁴
- A downward departure based on a finding that the defendant’s conduct did not threaten the harm sought to be prevented by the statutes of conviction. The defendant was convicted of attempting to export an orangutan and a gorilla. The defendant intended to export animals for breeding and exhibition. According to the appellate court, the “special factor” in this case was an encouraged departure factor listed at §5K2.11.²⁵
- A downward departure based on a finding that government conduct prejudiced the defendant’s case. The appellate court found that the prejudice the defendant encountered during plea negotiations was significant enough to take the case out of the heartland guidelines.²⁶
- A downward departure based on a finding that the sentence exaggerated the defendant’s conduct and culpability. According to the appellate court, the evidence revealed that the defendant was building fires to keep warm and did not possess a clear intent to commit arson.²⁷

²²*United States v. Horton*, 98 F.3d 313 (7th Cir. 1996).

²³*United States v. Sherwood*, 98 F.3d 402 (9th Cir. 1996).

²⁴*United States v. Walters*, 87 F.3d 663 (5th Cir.), *cert. denied*, 117 S. Ct. 498 (1996).

²⁵*United States v. Bernal*, 90 F.3d 465 (11th Cir. 1996).

²⁶*United States v. Lopez*, 106 F.3d 309 (9th Cir. 1997).

²⁷*United States v. Goodluck*, 103 F.3d 145 (10th Cir. 1996) (unpublished).

- A downward departure based on a finding that the hardship on the defendant's family caused by his incarceration would be exceptional. According to the appellate court, though the facts could have been construed differently, "we may not simply substitute our judgment for [that of the district] court."²⁸
- A downward departure from the career offender enhancement based on the defendant's age, ill health, and a remote previous conviction that resulted in a relatively lenient sentence. According to the appellate court, the sentencing court did not rely on any impermissible departure factors. The defendant was sixty-four at the time of sentencing and when released would be nearly 70 years old. The appellate court concluded that in light of the defendant's age and well documented infirmities, the district court was within its discretion in concluding that the defendant was less likely to recidivate than the ordinary defendant categorized as a career offender.²⁹

Appellate courts **affirmed upward departures** in the following cases:

- An upward departure based on a finding that the defendant's management of the assets of a large-scale criminal enterprise was outside the heartland of the aggravated role adjustment.³⁰
- An upward departure based on prolonged harassing and humiliating conduct directed toward the defendant's former high school girlfriend and her family. According to the appellate court, the harassment violated state and federal restraining orders and warranted a departure for extreme conduct.³¹
- An upward departure based on a finding that the defendant's conduct was part of a systematic corruption of a governmental function causing loss of public confidence in government.³²
- An upward departure based on a finding that the defendant's status as a career offender did not adequately represent the defendant's criminal past. According the appellate court,

²⁸*United States v. Galante*, 111 F.3d 1029 (2d Cir. 1997).

²⁹*United States v. Collins*, 1997 WL 437152 (N.D. Ok. Aug. 5, 1997) (No. 96-5039).

³⁰*United States v. Cali*, 87 F.3d 571 (1st Cir. 1996).

³¹*United States v. Taylor*, 88 F.3d 938 (11th Cir. 1996).

³²*United States v. Shenberg*, 89 F.3d 1461 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 961 (1997).

although the defendant's criminal history score was relatively low (16), the nature of the defendant's prior offenses warranted an upward departure from Criminal History Category VI.³³

- An upward departure based on a finding that the defendant's conduct caused substantial harm to the victims stemming from a credit card scheme which led to years of harassment by creditors, forced court appearances, forgery charges, and constant fear of arrest.³⁴
- An upward departure based on a finding that the defendant's use of a computer to transmit child pornography over the Internet to minors "to seduce a minor to engage in sexual activity" was outside the heartland of cases covered by the sentencing guidelines.³⁵
- An upward departure based on the defendant's persistent ten-year history of violent antisocial behavior and dangerous gang-related conduct underlying the offense. The appellate court concluded that shooting indiscriminately into crowded areas and discarding weapons in residential neighborhoods threatened public safety and warranted an upward departure.³⁶
- An upward departure based on findings that the defendant's criminal history category did not adequately reflect the seriousness of the defendant's past criminal conduct in light of evidence that the defendant participated in approximately 16 burglaries for which neither state nor federal charges were ever brought.³⁷
- An upward departure based on consideration of underlying counts dismissed pursuant to a plea agreement. The district court found that the defendant's involvement in a large police corruption scandal in Philadelphia caused a significant disruption of governmental functions pursuant to §5K2.7 and warranted an upward departure.³⁸
- An upward departure based on the conduct of a defendant who pleaded guilty to charges involving possession, transfer, and manufacture of illegal weapons. The appellate court found that the upward departure was not an abuse of discretion considering the defendant took affirmative steps to conceal illegal activity and ownership of illegal firearms and made a

³³*United States v. Lowe*, 106 F.3d 1498 (10th Cir.), *cert. denied*, 1997 WL 291895 (U.S. Jun. 23, 1997) (No. 96-9110).

³⁴*United States v. Wells*, 101 F.3d 370 (5th Cir. 1996).

³⁵*United States v. Delmarle*, 99 F.3d 80 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 1097 (1997).

³⁶*United States v. Hardy*, 99 F.3d 1242 (1st Cir. 1996).

³⁷*United States v. Collins*, 104 F.3d 143 (8th Cir. 1997).

³⁸*United States v. Baird*, 109 F.3d 856 (3d Cir. 1997).

videotape to teach others how to make silencers outside of the government's regulatory scheme.³⁹

- An upward departure based on the defendant's participation in torturing the victim. The appellate court concluded that the defendant's conduct which formed part of a count dismissed pursuant to a plea agreement could still be considered as a basis for an upward departure.⁴⁰
- An upward departure based on the degrading nature of the defendant's sexual assaults. According to the appellate court, the number of assaults involved and the viciousness of the acts were degrading in type, insulting in nature, and represented an encouraged basis for departure from the guidelines.⁴¹
- An upward departure based on significant personal injury and property damage. The appellate court concluded that the extent of the sentencing court's departure from the applicable guideline range was not an abuse of discretion where the court expressly relied on such approved grounds for departure as the nature of the injuries to the victims and significant property damage to a United States Post Office.⁴²

Appellate court **remanded** case to permit district court to consider departure:

- Where the district court, prior to *Koon*, revealed that its refusal to consider a downward departure for post-offense rehabilitation was because it believed that the law of the circuit prohibited it from doing so. According to the Fourth Circuit, the *Koon* decision rejected the reasoning used in its prior decision and effectively overruled its decision that post-offense rehabilitation can never form a proper basis for departure. Because post-offense rehabilitation is taken into account in the acceptance of responsibility guideline, a departure based on post-offense rehabilitation is permitted "only when present to such an exceptional degree that the situation cannot be considered typical of those circumstances in which an acceptance of responsibility is granted."⁴³
- Where the district court failed to make a factual finding regarding the circumstances surrounding the murder of the victim and whether the discharge of the firearm in this case

³⁹*United States v. Arce*, 1997 WL 403023 (S.D. Tex., Jul. 18, 1997) (No. 96-20983).

⁴⁰*United States v. Cross*, 1997 WL 419647 (E.D. Tenn., Jul. 29, 1997) (No. 96-5218).

⁴¹*United States v. Lewis*, 115 F.3d 1531 (11th Cir. 1997).

⁴²*United States v. Sablan*, 114 F.3d 913 (9th Cir. 1997).

⁴³*United States v. Brock*, 108 F.3d 31 (4th Cir. 1997).

was so extraordinary as to remove it from the heartland of situations encompassed within the second-degree murder guideline.⁴⁴

- Where the district court failed to make a factual finding regarding the possibility that the defendant suffered from a volitional impairment which prevented him from controlling his behavior or conforming to the law. The appellate court agreed with the defendant that the definition of “significantly reduced mental capacity” contained a volitional component not adequately considered by the district court when determining the defendant’s eligibility for a downward departure pursuant to §5K2.13.⁴⁵

IV. Post-Koon District Court Departure Decisions

The *Koon* decision reiterated the Supreme Court’s desire not to completely alter the appellate court’s traditional deference to the district court’s exercise of its sentencing discretion. The Supreme Court viewed the departure decision of a district court as primarily factual and judgmental. The departure decision was described as making a “refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing.”⁴⁶ In the post-*Koon* departure cases discussed below, district courts have granted and denied departures based on numerous factors.

District courts **granted downward departures** in the following cases:

- The sentencing court granted a downward departure based on perceived disparity between the state and federal sentences. The district court reasoned that in the state district court the defendant would have faced a maximum sentence of two and a half years and the prosecution of the case in federal court was strictly for the purpose of imposing a longer period of incarceration. The downward departure lowered the possible federal sentence from a possible 21 to 15 years.⁴⁷
- The sentencing court granted a downward departure based on the defendant’s “extraordinary rehabilitative” efforts after his arrest for LSD distribution. The district court found that the defendant’s work and educational achievements were significant enough, in light of the totality of the circumstances, to depart from the applicable guideline range.⁴⁸

⁴⁴*United States v. Barber*, 1997 WL 386103 (E.D.N.C., Jul. 14, 1997) (No. 95-5238).

⁴⁵*United States v. McBroom*, 1997 WL 528657 (D.N.J. Aug. 28, 1997) (No. 96-5719).

⁴⁶*Williams v. United States*, 503 U.S. 193 (1992).

⁴⁷*United States v. Snyder*, 954 F. Supp. 19 (D. Mass. 1997).

⁴⁸*United States v. Griffiths*, 954 F. Supp. 738 (D. Vt. 1997).

- The sentencing court granted a downward departure based on extraordinary family responsibilities. The district court found that the financial shift in family finances was found in virtually every case where a single parent was sentenced to a period of incarceration. The highly publicized suicide of the children's father, however, did constitute a unique circumstance that warranted a departure from the applicable guideline range.⁴⁹
- The sentencing court granted a downward departure for the exceptionally cruel childhood abuse of the defendant by his father and his father's acquaintances. The court concluded that the physical, sexual, and psychological abuse was relentlessly inflicted on the defendant over an extended period of years and was a form of sadistic torture to an extent not seen in other defendants who suffered some form of physical or sexual abuse. The court rejected the Government's assertion that he based the departure on "lack of guidance as a youth," a prohibited departure factor.⁵⁰
- The sentencing court made a downward departure in a money laundering case involving illegal campaign contributions. The court held that this type of conduct was not intended to be reached by the money laundering statute. The Department of Justice's internal document on prosecuting illegal campaign funding indicated that this type of conduct should have been prosecuted as a misdemeanor. According to the district court, the charging decision subjected the defendant to a more stringent sentence than intended by the drafters of the money laundering statute and resulted in an atypical case not reasonably contemplated by the Commission. The defendant had no intent of legitimizing a stream of illegal income into the mainstream economy, but only to conceal the source of the corporate check. The structure and purpose of the fraud guideline was more appropriate.⁵¹
- One-level downward departure in light of defendant's agreement to stipulate to his deportation.⁵²
- The sentencing court granted a three-level downward departure where the viability of two small companies, which together employed 15 people, was dependent on the defendant's daily presence and sales efforts. The defendant continued to work 60 hours per week without compensation after being forced to resign as the manager of one company. Many employees might not have been able to obtain other positions, due to their age and other

⁴⁹*United States v. Bissell*, 954 F. Supp. 841 (D.N.J. 1996).

⁵⁰*United States v. Ayers*, 1997 WL 321715 (N.D. Ill., May 30, 1997) (No. 95-CR-131).

⁵¹*United States v. Ferrouillet*, 1997 WL 266627 (E.D. La., May 20, 1997) (No. 96-198).

⁵²*United States v. Ramnath*, 958 F. Supp. 99 (E.D.N.Y. 1997).

factors had the defendant not to do so. The court stressed that the propriety of departure in such cases presents a particularly factual inquiry.⁵³

- The sentencing court announced its intention to depart downward because the monetary loss in the case overstated the gravity of the offense for failing to truthfully account for and pay employment withholding taxes. The court found that defendant structured payments to delay payment of portion of employment taxes, but ordinarily paid them, although late, with penalties and interest, until his financial circumstances prevented him from doing so. The court concluded that there was no intent to defraud and, therefore, monetary loss was not a proper measure of culpability.⁵⁴
- The sentencing court departed downward where the defendant received pornographic images of children via the Internet. The court noted that the images involving minors were a small percentage of the total images the defendant received. Subsequent psychological studies revealed that the defendant was not a pedophile and most likely did not receive the pictures of minors intentionally. The court concluded that the case fell outside the heartland due to unusual susceptibility to abuse in prison (defendant was a homosexual state trooper of diminutive stature and weight) and extraordinary post-offense efforts at rehabilitation (the director of the renowned sex offender treatment program in which he was enrolled testified as to his extraordinary progress).⁵⁵

A district court **denied a downward departure** in the following cases:

- The sentencing court denied a downward departure to the defendant who pleaded guilty to receipt of child pornography. The court held that the actions of the defendant did not constitute aberrant behavior and that the traumatic events of his life, including the death of his father and father-in-law, illnesses of his wife and daughter, and incarceration of his son, were not so “extraordinary in nature” as to warrant a downward departure.⁵⁶
- The sentencing court denied a downward departure based on a combination of factors. The court refused to depart downward for lack of sophistication and education citing that those factors were not ordinarily relevant. The court also rejected the defendant’s argument that he relied solely on his co-defendant’s legal expertise, finding both equally culpable. Additionally, the court did not depart based on the defendant’s family ties, noting that the defendant and his wife had been separated for over 20 years and his daughter was 35 years

⁵³*United States v. Morgan*, 1996 WL 633993 (N.D. Ill., Oct. 29, 1996) (No. 96-CR-200).

⁵⁴*United States v. Brennick*, 949 F. Supp. 32 (D. Mass. 1996).

⁵⁵*United States v. Shasky*, 939 F. Supp. 695 (D. Neb. 1996).

⁵⁶*United States v. Artim*, 944 F. Supp. 363 (D.N.J. 1996).

old and living in a different state. Finally, the defendant's health claims were rejected as a basis for departure because he failed to supply the court with substantial medical documentation.⁵⁷

- The sentencing court denied a downward departure where the defendant claimed the guidelines overstated the seriousness of money laundering offense because his co-defendant paid him only \$900. The court concluded that the defendant's sentence was already in the lowest range provided by the money laundering guideline. Additionally, the defendant's claim that he was the victim of his co-defendant, a lawyer, was not credible. The court found that the defendant was a mature, well-educated, experienced businessman who knew the money he helped launder came from drug trafficking. Furthermore, the court gave no departure for being a minor participant because there was no significant distinction between the defendant's level of culpability and that of most other co-defendants. Finally, although defendant was extensively involved in the community, professionals and businessmen convicted of white collar crimes often have had greater opportunity to participate in the wider community than others, thus their participation was not deemed extraordinary as to justify a downward departure.⁵⁸
- The sentencing court denied a downward departure based on defendant's contention that he had intended to return all but \$8,700 of the \$144,000 he stole. The court concluded that an intention to return does not take the case out of the heartland. Loss is defined as the amount taken, regardless of what may be recovered or returned.⁵⁹
- The sentencing court denied a downward departure based on defendant's claim that the Government controlled the amount of money laundered by the defendant and because of the undercover agent's sexual misconduct with defendant and subsequent concealment of the misconduct. The court held that the Government had not induced the defendant to launder more money than she had originally intended. Additionally, the misconduct of the undercover agent in having a sexual encounter with the defendant and in the subsequent attempted coverup, the court found no logical nexus between the misconduct and the offense. The defendant was not induced to commit or enlarge her offense as a result of the sexual relations, which occurred after the offense was completed.⁶⁰
- The sentencing court denied a downward departure based on successive federal and state prosecutions for the same conduct. Although the Supreme Court in *Koon* upheld a departure

⁵⁷*United States v. Carter*, 1997 WL 297076 (E.D. Pa., May 22, 1997) (No. 95-435-5).

⁵⁸*United States v. Ellis*, 1997 WL 297080 (E.D. Pa., May 22, 1997) (No. 95-435-4).

⁵⁹*United States v. Kendall*, 1997 WL 208655 (N.D. Ill., Apr. 23, 1997) (No. 96-CR-531).

⁶⁰*United States v. Nolan-Cooper*, 957 F. Supp. 647 (E.D. Pa. 1997).

based on this factor, the district court held that the total circumstances of this case were such that they negated the court's exercise of discretion to grant a departure.⁶¹

- The sentencing court denied a downward departure based on family ties where the defendant, a single parent of a four-year-old child, would be forced to send the child to live with relatives if incarcerated. The court concluded that although the child's father had recently died, no extraordinary hardship existed.⁶²
- The sentencing court denied a downward departure based on family ties. The court looked to the violent conduct involved in the case, and the extreme and graphic threats made to extort payments from the victim. The court concluded that the seriousness of the offense and the need for deterrence and incapacitation overrode any family tie factors.⁶³
- The sentencing court denied a downward departure based on the conditions of pre-trial confinement. Although the Supreme Court's decision in *Koon* did not foreclose a sentencing court from considering such conditions as a possible basis for departure, the district court declined to do so because the evidentiary record submitted in support of the motion failed to illustrate that the defendant's experiences were so atypical as to justify the "highly infrequent" exercise of granting a downward departure based on a factor not mentioned in the guidelines.⁶⁴

District court **departed upward** in the following case:

- The defendant was convicted of conspiracy to sell fraudulent securities and related offenses in a Ponzi-type, pyramid investment scheme. The district court held that the defendant's guideline range of 188-235 months was inadequate because the highest loss amount in the fraud loss tables was \$80 million and the defendant was responsible for losses well over \$500 million. The court took into consideration that the defendant's scheme was extremely sophisticated and well planned, involving over 3,000 individuals, companies, trust funds and pension plans. Additionally, the sentencing court received hundreds of letters detailing the devastating impact of the defendant's fraud on their lives, health, and family.⁶⁵

⁶¹*United States v. Williams*, 954 F. Supp. 1093 (D. Md. 1997).

⁶²*United States v. Blackwell*, 954 F. Supp. 944 (D.N.J. 1997).

⁶³*United States v. Malpeso*, 943 F. Supp. 254 (E.D.N.Y. 1996).

⁶⁴*United States v. Sutton*, 1997 WL 432393 (D.N.J., Jul. 22, 1997) (No. 96-469 (WGB)).

⁶⁵*United States v. Hoffenberg*, 1997 WL 96563 (S.D.N.Y., Mar. 5, 1997) (No. 94-CR-213RWS, 95-CR-321 RWS).